IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 13, 2008 Session

TONY E. OGLESBY v. LIFE CARE HOME HEALTH, INC.

Appeal from the Chancery Court for Bradley County
No. 05-195 Jerri S. Bryant, Chancellor

No. E2007-01514-COA-R3-CV - FILED MAY 27, 2008

Tony E. Oglesby ("Plaintiff") sued Life Care Home Health, Inc. ("Defendant") for breach of contract. After a bench trial, the Trial Court entered an order finding and holding, *inter alia*, that the parties had a binding contract, that the contract is not ambiguous, that the word "less" in the contract means "to exclude", and that under the contract Plaintiff was entitled to a judgment in the amount of $2,329,638.20. Defendant appeals to this Court. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Jerry H. Summers, Chattanooga, Tennessee and Jeffery A. Billings, Cleveland, Tennessee for the Appellant, Life Care Home Health, Inc.

Timothy L. Warnock and James N. Bowen, Nashville, Tennessee and Gary R. Patrick, Chattanooga, Tennessee for the Appellee, Tony E. Oglesby.

OPINION

Background

In the fall of 2003, Plaintiff started his employment with Defendant. Before beginning this employment, Plaintiff entered into an agreement with Defendant that provided that after one year of employment, Plaintiff would be vested with a 25% ownership interest in Defendant. Plaintiff and Defendant also executed a shareholder agreement ("the Contract") that provided, in pertinent part, that Defendant was required to purchase Plaintiff's shares if Plaintiff voluntarily terminated his employment with Defendant. The purchase price for Plaintiff's shares was to be equal to "3x Earnings multiplied by a fraction, the numerator of which is the total number of Shares owned by [Plaintiff] and the denominator of which is the total number of issued and outstanding Shares." In the Contract, "Earnings" is defined as:

> the EBITDA of the Corporation for the three 12-month periods immediately preceding the date of the event giving rise to the obligation or option to purchase or sell Shares pursuant to this Agreement or other event requiring a computation of earnings under this Agreement less any one time charges and corporate allocation including repayments of amounts owed to Life Care Centers of America, Inc., Forrest L. Preston or their affiliated companies.

EBITDA is an accounting term that is generally understood to stand for earnings before interest, taxes, depreciation, and amortization.

Plaintiff voluntarily terminated his employment with Defendant after approximately a year and a half and sought payment for his shares as provided in the Contract. Defendant claimed that under the formula provided in the Contract, Plaintiff was not entitled to be paid anything for his shares. Plaintiff sued Defendant for breach of contract, and the case was tried without a jury.

At trial, the parties agreed that they had entered into a binding contract. The dispute centered around the meaning of the phrase "less any one time charges and corporate allocation including repayments of amounts owed to Life Care Centers of America, Inc., Forrest L. Preston or their affiliated companies" as found in the Contract.

At the conclusion of the trial, the Trial Court entered an order finding and holding, *inter alia*, that the parties did not dispute that they had entered into the shareholder agreement, which was a binding contract; that interpretation of the shareholders agreement was a matter of law; that the EBITDA was $867,059; that the disputed word "less" in the shareholders agreement is not ambiguous; and that the word "less" in the shareholders agreement means "to exclude." The Trial Court's order awarded Plaintiff a judgment of $2,329,638.20.

Defendant appeals to this Court.

Discussion

Although not stated exactly as such, Defendant raises one issue on appeal: whether the Trial Court erred in interpreting the Contract. Defendant maintains that the proper interpretation of the Contract results in Plaintiff being owed nothing for his shares.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

As this Court explained in *Quebecor Printing Corp. v. L & B Mfg. Co*:

> In resolving a dispute concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contract language. *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 889-90 (Tenn. 2002)(citing *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999)). A determination of the intention of the parties "is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide." *Planters Gin Co.*, 78 S.W.3d at 890 (citing 5 Joseph M. Perillo, *Corbin on Contracts*, § 24.30 (rev. ed. 1998)); *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001)). The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. *Planters Gin Co.*, 78 S.W.3d at 890. The parties' intent is presumed to be that specifically expressed in the body of the contract. "In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such intent if it does not conflict with any rule of law, good morals, or public policy." *Id.* (quoting 17 Am. Jur. 2d, *Contracts*, § 245).
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> This Court's initial task in construing the Settlement Agreement at issue, as was the Trial Court's, is to determine whether the language of the contract is ambiguous. *Planters Gin Co.*, 78 S.W.3d at 890. If the language is clear and unambiguous, the literal meaning of the language controls the outcome of the dispute. *Id.* A contract is ambiguous only when its meaning is uncertain and may *fairly* be understood in more than one way. *Id.* (emphasis added). If the contract is found to be ambiguous, we then apply established rules of construction to determine the intent of the parties. *Id.* Only if ambiguity remains after applying the pertinent rules of construction does the legal meaning of the contract become a question of fact. *Id.*

Quebecor Printing Corp. v. L & B Mfg. Co., 209 S.W.3d 565, 578 (Tenn. Ct. App. 2006).

To begin, we note that both parties agree and the Trial Court found that the Contract is unambiguous. The parties, not surprisingly, do disagree as to what the "unambiguous" language means. We agree with the Trial Court that the Contract is unambiguous. As the Contract is unambiguous, our review involves a question of law and is *de novo*. *See Quebecor Printing Corp.*, 209 S.W.3d at 578.

In addition, Defendant does not dispute on appeal that the EBITDA figure of $867,059.00 as found by the Trial Court is the correct EBITDA number. Rather, Defendant argues, in essence, that the calculation should begin with this EBITDA figure and then in order to calculate "less any one time charges and corporate allocation including repayments of amounts owed to Life Care Centers of America, Inc., Forrest L. Preston or their affiliated companies," those specific charges and allocation amounts which already were subtracted once in calculating the EBITDA should be subtracted a second time from the EBITDA figure. The resulting number obtained using Defendant's calculations is a negative number, which Defendant asserts means that "no compensation is owed for [Plaintiff's] shares."

The $867,059.00. EBITDA figure, which the Trial Court found to be the correct amount, appears in the record on Trial Exhibit 13. Our review of Trial Exhibit 13 reveals that the EBITDA figure was calculated by subtracting one time charges and corporate allocations. We find and hold, as did the Trial Court, that the EBITDA figure of $867,059.00 on Trial Exhibit 13 is the correct EBITDA figure, and we reiterate that there is no dispute on appeal regarding this particular finding.

The Trial Court held that "less" in the Contract means "to exclude." We agree with the Trial Court that "to exclude" is a reasonable interpretation of the word "less" as used in the Contract. In order to exclude these specific one time charges and corporate allocations from the EBITDA figure, a figure which was calculated by a method that *includes* the subtraction of those charges and allocations, it is necessary to add those numbers back to the EBITDA figure. Stated another way, the EBITDA figure could either be calculated by adding the one time charges and the allocations back into the EBITDA figure of $867,059.00 as this calculation involved subtracting those charges and allocations to arrive at the $867,059.00, or it could be calculated by utilizing a formula that leaves the one time charges and allocations out of the equation used to calculate the beginning EBITDA figure. Either way, the result is the same. The correct number utilized must, under the Contract, exclude "one time charges and corporate allocation including repayments of amounts owed to Life Care Centers of America, Inc., Forrest L. Preston or their affiliated companies" as is clearly and unambiguously stated in the Contract.

If the number were calculated utilizing the procedure urged by Defendant, the resulting number would not exclude "one time charges and corporate allocation including repayments of amounts owed to Life Care Centers of America, Inc., Forrest L. Preston or their affiliated companies" from the calculation but instead would include those charges and allocations twice, once by subtracting them in the calculation of the original EBITDA figure and then again by subtracting them a second time from that EBITDA figure. Such a calculation is not what the clear and unambiguous language in the Contract provides.

Defendant also argues that the Trial Court's order results in a windfall to Plaintiff given the short period of time that Plaintiff actually worked for Defendant. However, as this Court explained in *Quebecor Printing Corp.*:

> It is not the role of this Court "to make a different contract than that executed by the parties." *Posner v. Posner*, No. 02A01-9710-CV-00249, 1997 WL 796216, at *2-3, 1997 Tenn. App. LEXIS 930, at *6 (Tenn. Ct. App. Dec. 30, 1997), *no appl. perm. appeal filed*. *See also, e.g., Central Drug Store v. Adams*, 184 Tenn. 541, 201 S.W.2d 682 (1947). "In the absence of fraud or mistake, a contract must be interpreted and enforced as written even though it contains terms which may be thought to be harsh or unjust." *Tenpenny v. Tenpenny*, No. 01-A-01-9406-CV-00296, 1995 WL 70571, at *6, 1995 Tenn. App. LEXIS 105, at *15 (Tenn. Ct. App. Feb. 22, 1995), *appl. perm. appeal denied July 3, 1995*.

Quebecor Printing Corp., 209 S.W.3d at 581.

We affirm the Trial Court's judgment.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Life Care Home Health, Inc., and its surety.

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D. MICHAEL SWINEY, JUDGE